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IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1810

FLORENCE BEHAR,

Petitioner,

—VS.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER FLORENCE BEHAR

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Petitioner, Florence Behar, replies as follows to the brief for the United States in opposition [hereinafter, "Brief of the United States"], and reasserts all arguments contained in her petition. Since the Brief of the United States has chosen to cite to the opinion of the Court of Appeals, as contained in the appendix of the petitioners in Number 75-1798 [hereinafter, "Bernstein Pet. App."], we shall do likewise in order to avoid confusion.

ARGUMENT

I.

The District Court's charge to the jury was clearly erroneous and violative of due process of law with respect to the standard of liability as to the false statement counts of the indictment.*

The Brief of the United States has failed to focus upon the substantial issue which is presented by the Court's charge to the jury in the present case, to wit: legal responsibility which devolves upon one who executes a "knowledge and belief" certificate.

As shown by the facts set forth at pp. 9-14 of our petition, the petitioner Behar, being the processing supervisor at Eastern Service Corporation, would, on a daily basis, receive many packages containing applications for mortgage insurance and numerous supporting documents. She would review each package for completeness, i.e., to determine whether each of the forms had been completed and executed, and she would then sign a certificate which was printed at the bottom of the application form. An application for a "Property Appraisal and Commitment" (Form 2800, which is set forth in Volume VI of the Appellants' Appendix in the Court of Appeals, at p. C. 1129) contained the following certificate:

> "Mortgagee's certificate: The undersigned mortgagee certifies that *to the best of its knowledge* all statements made in this application and the supporting documents are true, correct and complete.

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* This issue is discussed in the majority opinion of the Court of Appeals at C. 42-47; in the dissenting opinion of Circuit Judge Van Graafeland at C. 53-73; in Florence Behar's petition for a writ of certiorari at pp. 31-33; and in the Brief for the United States at pp. 16-23.

> "Signature/title of mortgage officer:" [Emphasis added].

The Application for Credit Approval (Form 2900, set forth in Volume VI of the Appellants' Appendix in the Court of Appeals, at p. C. 1130) contains the following certificate:

> "Mortgagee's certificate—The mortgagee certifies that all information in this application is true and complete *to the best of its knowledge and belief.* Signature "
> [Emphasis added].

Separate and apart from Federally insured mortgage programs, there must be thousands of similar certificates signed each day by persons transacting business with the United States government. Since petitioner Behar's liability was predicated upon her execution of those certificates, the manner in which the District Court and the Court of Appeals have permitted a finding of "constructive knowledge" has far-reaching ramifications for all citizens and business enterprises who engage in transactions with the Federal government.

The District Court's charge to the jury, as set forth in Judge Van Graafieland's dissent, at pp. C. 54-57, and in the Brief of the United States, at pp. 13-15, reveals that the jury was instructed that the knowledge requirement of 18 U.S.C. § 1010 could be established in any one of four ways: actual knowledge, awareness of high probability of falsity, conscious avoidance of what would otherwise have been obvious, and recklessness. The evidence did not show, nor did the government urge at trial or upon appeal, that petitioner Behar had actual knowledge of the false statements contained in the applications which she certified. Moreover, the Court of Appeals held that

". . . there is no way of knowing on which basis the jury decided the case so that if the recklessness charge were erroneous the false statement counts and conspiracy count must fall." (Bernstein Pet. App. C. 42, N. 17).

The recklessness theory upon which the jury was permitted to convict was made dependent by the trial court upon the jury making certain findings of fact concerning whether one who executes such a certificate has: (a) a duty to investigate the truth of allegations made in the body of the application; (b) a duty to "exercise proper credit judgment" in investigating the facts and assessing the application; and (c) "an affirmative duty to insure that statements made in the application were true". (Bernstein Pet. App. C. 56, N. 3).

In finding the petitioner Behar guilty, the jury may well have made such findings. The question, then, is whether any legal and factual basis existed which would support such a theory of liability.

The opinion of the Court of Appeals found such a legal basis upon the theory that:

> "The entire scheme of FHA mortgage guarantees presupposes an honest mortgagee performing the initial credit investigation with due diligence and making the initial judgment to lend in good faith after due consideration of the facts found. The trial court in our view could have charged that ESC had commensurate duties as a matter of law, that Harry Bernstein as principal corporate officer did also, and that Florence Behar as officer in charge of processing mortgage loans and signing the mortgagee's necessary certification of the application as 'true and complete to the best of its knowledge and belief' did likewise. It is our view

> that delimiting those duties by defining them as duties 'to investigate' and to use 'good credit judgment' was a fair description of the responsibilities inherent in the relationship between the defendants and the FHA * * *." (Bernstein Pet. App. at C. 45-46).

The Brief of the United States relies upon the above quoted Court of Appeals analysis, and further argues that an implicit *quid pro quo* for "virtually risk-free benefits of participation in the Federal program" was that mortgagees "take reasonable steps to assure themselves of the truth of information set forth in the applications they submit to FHA." (Brief of the United States, at p. 20).

As appealing as these analyses may be, from the point of view of economic or administrative desirability, they simply do not find support in any legislative, regulatory or other articulated statement of obligation or affirmative duty imposed upon FHA approved lenders.

The Brief of the United States argues that "The correctness of the Court of Appeals' decision is demonstrated both by the governing legislation and by the practical relationship that exists between the FHA and mortgagees [approved lenders] who participate in the Federal mortgage insurance program." (Brief of the United States, at p. 20). However, the Brief of the United States is remarkably devoid of any reference to such affirmative duties in "the governing legislation". Its speculation as to the "practical relationship" omits any reference to the fact that, with respect to each application, pursuant to FHA regulations, there was provided to the FHA a Dun & Bradstreet credit report, verifications of applicants' bank deposits, and verifications of applicants' employment (Bernstein Pet. App., at C. 66). Moreover, the Brief of the United States omits mention of the fact that once an

application is submitted, it must run the gamut of FHA staff underwriters, processors, credit analysts, appraisers, review appraisers, clerical personnel, supervisors, etc., who make the final judgment as to whether an application will be approved (Tr. 2220, et seq.; *see also*: Behar petition, at pp. 10-12).

It is of no little significance that no witness at trial, nor the District Court in its charge to the jury, nor the Court of Appeals, nor the Brief of the United States attempts to define the concept of "proper credit judgment" (*See*: Judge Van Graaffieland's analysis of that omission in Bernstein Pet. App., at C. 53-54, C. 63-70).

* * *

The Brief of the United States make vain effort to distinguish the holding of the United States Court of Appeals for the Sixth Circuit in *United States* v. *Ekelman & Associates, Inc.*, 532 F.2d 545 (6th Cir., 1976). (Brief of the United States, at pp. 21-23).* In doing so, the Brief of the United States implies that some kind of a material difference exists between applications for mortgage insurance under the Veteran's Administration program and applications under the FHA program. In fact, there is

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* It is noteworthy that, on July 27, 1976, the Solicitor General wrote to the Clerk of this Court, and advanced the following reason for an enlargement of time within which to file the Government's response to the instant petition:

> "The government is currently preparing a petition for a writ of certiorari in the case of *United States* v. *Ekelman*, C.A. 6 No. 75-1123, decided March 12, 1976, which involves an issue closely related to one presented by the instant petitions. This application for an extension of time is necessary so that we may further consider and formulate our response to the instant petitions in light of our position in *Ekelman*."

In fact, the Government appears to have subsequently decided not to seek a review by this Court of the Ekelman holding, and not petition for a writ of certiorari was filed by the Government.

no such material difference, and none appears from the analysis set forth in the *Ekelman* opinion. (*See*: Brief of the United States, at p. 21, fn. 15).

The Brief of the United States further suggests that *Ekelman* is distinguishable because it involved "False Claims Act liability with regard to the Veteran's Administration Loan program rather than criminal liability under 18 U.S.C. § 1010 with regard to an FHA program." (Brief of the United States, at p. 22). It is transparently absurd for the government to argue that a lower threshold of proof or a less clearly defined standard of liability is applicable in criminal proceedings than in civil proceedings.

The final effort by the brief of the United States to distinguish *Ekelman* is contained in the following argument:

> " • • • The Court of Appeals here did not hold as the government had urged unsuccessfully in *Ekelman*, that mere breach of a fiduciary duty to verify information would suffice for liability if the information was subsequently discovered to be false. To the contrary, the Court of Appeals emphasized that the District Court's 'charge did not indicate that it was a crime not to exercise "proper credit judgment" and did not equate failure to do so with reckless disregard of the truth' (Bernstein Pet. App. C. 44). Instead, the District Court had charged that 'proof of mere negligent falsehood was insufficient' and that, even if the jury found an affirmative duty to verify and to exercise credit judgment, 'the existence of potential recklessness was still a question of fact' (Id. at C. 44-C. 45)." (Brief of the United States, at pp. 22-23).

The Brief of the United States has thoroughly misconstrued the holding of the Court of Appeals and the nature of the issue raised by our petition. The issue is whether

there was any basis in law and in fact upon which the jury could be permitted to find that the specified "affirmative duties" were imposed upon the petitioner.*

Thus, the issue in *Ekelman* is precisely the issue presented by the present case; it involves the same certification as that involved in the present case (*United States* v. *Ekelman*, *supra*, 532 F.2d at 548, fn. 2), and presents a square conflict between the Circuits as regards a substantial and continually recurring problem.

For the above reasons, as well as those set forth in Judge Van Graafieland's dissent, we respectfully urge that the petition for a writ of certiorari should be granted to resolve that issue.

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* This is made clear by the portion of the Court of Appeals' opinion *not quoted* by the brief of the United States:

> "The charge as we read it was that in determining whether there was reckless disregard of the statements' falsity such as to amount to knowledge, it was for the jury to determine whether as mortgagee ESC had affirmative duties in connection with mortgagor's loan guarantee applications. If such duties were found, the existence of potential recklessness was still a question of fact. The charge as such gave the defendants more than that to which they were entitled (Bernstein Pet. App., at C. 45)."

The opinion of the Court of Appeals went on to hold that:

> "The trial court in our view could have charged that ESC had commensurate duties as a matter of law, that Harry Bernstein as principal corporate officer did also, and that Florence Behar as officer in charge of the processing mortgage loans and signing the mortgagee's necessary certification of the application as 'true and complete to the best of its knowledge and belief' did likewise." (Bernstein Pet. App. at C. 45-46).

II.

Petitioner was unconstitutionally denied representation by counsel of her choice.*

The Brief of the United States makes a factually erroneous assertion which lends some color to the government's arguments. Contrary to the Government's assertion, the co-defendant, Harry Bernstein, did not refer the petitioner Behar to Mr. Boitel (Brief of the United States, at p. 24). As noted by the opinion of the Court of Appeals, it was Bernstein's attorney who undertook to and did make the reference. (Bernstein Pet. App., at C. 21). That reference related solely to one Grand Jury appearance in October, 1971, six months elapsed before any other proceeding occurred, and Mrs. Behar then turned to Mr. Boitel for assistance.

The Brief of the United States in opposition argues that: "Since petitioner Behar's waiver was neither free of compulsion nor unequivocal, the trial judge acted within his discretion in refusing to accept it." (Brief of the United States, at p. 26).

It is clear that Mrs. Behar did not have the funds to pay the legal costs which would be incurred by virtue of a trial of many months duration. To that extent, there was a financial pressure upon her to accept payment of her legal costs by her employer. There is no indication that she was compelled to select an attorney chosen by her employer or by her employer's attorney. As it turned out, the attorney that was referred to her was not only acceptable to Mrs. Behar, but her pleadings with the Court

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* This issue is discussed in the majority opinion of the Court of Appeals (Bernstein Pet. App. at C. 21-24), in our petition for a writ of certiorari, at pp. 14-24, and in the Brief of the United States at pp. 23-28.

throughout the conflict of interest hearing demonstrated her overwhelming desire that the attorney in question represent her.

This was so notwithstanding the Court's repeated warnings to her of possible adverse consequences.

The claim that Mrs. Behar's waiver was not "unequivocal" is simply unsupported by the record. (*See* our petition herein, at p. 20).

Finally, the brief of the United States notes that "At sentencing petitioner Behar stated to the Court that she was satisfied with attorney Rosenkranz's handling of her case (D. 46)." (Brief of the United States, at p. 29).

Here was a middle-aged woman who had been through more than two years of proceedings since indictment, and a nine month trial. She was about to be sentenced by the same judge who had divested her of her attorney of choice and who had personally selected her assigned attorney. This was the same judge who had told her, at the time of the conflict of interest hearing, "You could go to jail for more than one hundred years" (C. 274). It is thus, not strange that, with sentence about to be pronounced, Mrs. Behar would respond as follows to the Court's inquiries:

> "The Court: * * * Is there—the gentleman standing to your right is Mr. Rosenkranz your court-appointed lawyer, is that correct?
>
> "Mrs. Behar: Yes.
>
> "The Court: Are you satisfied with the way he handled your matter?
>
> "The Defendant: Yes.

"The Court: Do you want him to appear for you at this sentencing?

"The Defendant: Yes."

This was the one and only time during the entire course of these proceedings that the Court addressed any inquiry to Mrs. Behar concerning her satisfaction with her appointed attorney. Under these circumstances, only a radical, of rather imprudent mind, would have revived the issue concerning counsel of her choice.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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New York, New York
November 15, 1976